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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re Marriage of Deborah C. and  
Jon S. Tyrell.

DEBORAH C. TYRELL,

Appellant,

v.

JON S. TYRELL,

Respondent.

B211121  
(Los Angeles County  
Super. Ct. No. BD378897)

APPEAL from an order of the Superior Court of Los Angeles County.  
Elizabeth R. Feffer, Judge. Affirmed.

Law Offices of Lee W. Salisbury and Lee W. Salisbury for Appellant.

Helms & Myers and Sterling E. Myers for Respondent.

Appellant challenges the family court’s order modifying her spousal support from \$2092 to \$3092 for a one-year period. We affirm.

## **RELEVANT FACTS AND PROCEDURAL BACKGROUND**

Appellant Deborah C. Tyrell and respondent Jon S. Tyrell were married in 1982.<sup>1</sup> Their marriage produced three children: Joshua, Drew, and Spencer. During the marriage, Jon established a practice as a general and vascular surgeon. Deborah held clerical positions for several years and then worked in the home. In the course of their marriage, they incurred several debts, including an unsecured loan for \$120,000 from Wells Fargo Bank (Wells Fargo).

In 2002, Jon and Deborah separated, and Deborah filed a petition for dissolution of marriage. Pursuant to a settlement between the parties, on May 7, 2004, the family court filed a stipulated judgment of dissolution. The judgment gave the parties joint legal custody of the two then-minor children, Drew and Spencer, but awarded primary custody of Drew to Deborah, and primary custody of Spencer to Jon. Jon was ordered to pay Deborah \$1,704 per month in child support for Drew, and \$49 per month in child support for Spencer. In addition, Jon was ordered to pay Deborah \$2,092 per month in spousal support “until the death of either party, [Deborah’s] remarriage or further order of the Court.” The judgment stated that Jon had gross monthly income of \$18,300 (after payment of malpractice insurance premiums), and that Deborah had the ability to earn income at the rate of \$6.75 per hour. The judgment allocated the Wells Fargo debt to Jon

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<sup>1</sup> As the key parties share a surname, we refer to them by their first names.

as his separate property, and he was directed “to indemnify[,] defend[,] and hold [Deborah] harmless” regarding the debt.

In August 2005, Wells Fargo sued Jon and Deborah to collect on the debt. In September 2005, Jon filed a Chapter 7 bankruptcy petition, and the Wells Fargo action was stayed with respect to him. Deborah later began an action against Jon regarding the Wells Fargo debt within the bankruptcy proceeding. On November 15, 2006, a judgment for \$128,677.81 was entered against Deborah in Wells Fargo’s action.

On December 17, 2007, Deborah filed the underlying application for a modification of the original spousal support order, requesting an increase to \$10,000 per month for three years. Deborah’s application identified a single material change in her circumstances, namely, Jon’s bankruptcy proceeding, which had effectively shifted responsibility for the Wells Fargo debt to her. Deborah asserted that she was attending school to secure employment, and argued that the increased spousal support would give her “enough breathing room” to raise herself to the financial level the parties had anticipated when the judgment of dissolution was entered.

In Deborah’s supporting declaration, she stated that her financial situation had been impaired by Jon’s failure to pay the Wells Fargo debt, in contravention of their settlement. Wells Fargo had forced her to attend judgment debtor examinations, levied \$3,000 from her bank accounts, and asserted a lien against her condominium, leaving her little or no equity in it. She had also been compelled to hire an attorney to bring an action against Jon in the bankruptcy proceeding. Deborah further stated that after unsuccessful attempts to find long-term employment, she had enrolled in an educational program, and expected to become a licensed and certified hypnotherapist in March 2008. As a hypnotherapist, she could earn up to \$300 per day “once [she got] back on [her] feet.” Deborah

asserted: “In order to be able to survive through this financial crisis which has been created by [Jon], and because of the drastic change in my financial circumstances that it has caused, I am requesting that the Court increase spousal support . . . for a period of three years . . . .”

In February 2008, the bankruptcy court entered a judgment in Deborah’s favor against Jon regarding the Wells Fargo debt. The judgment awarded her damages arising from Jon’s failure to pay the Wells Fargo debt, and included an attorney fee award. Under the judgment, Deborah was obliged to negotiate with Wells Fargo for purposes of assigning to Wells Fargo her rights under the judgment; in addition, she was required to place funds collected from Jon in an account for Wells Fargo’s benefit.

On June 23, 2008, Jon filed his opposition to Deborah’s application for an increase in spousal support, asking the family court to “step down” -- that is, reduce -- Deborah’s spousal support by \$500 per year over a period of four years. Jon contended that Deborah was capable of earning from \$12.00 to \$14.00 per hour in a full-time position as a bookkeeper or supermarket checker. He further asserted that he was working in three positions to earn income to pay the children’s college and living expenses, for which he had assumed full responsibility.

Regarding the Wells Fargo debt, Jon stated in his supporting declaration that the parties faced serious financial problems during their divorce proceedings. As a result, they obtained advice from lawyers specializing in bankruptcy, and structured the terms of their settlement with due regard for the possibility that Jon would file a bankruptcy petition. According to Jon, Wells Fargo forced him into bankruptcy when it sued him and Deborah regarding the debt: “The alternative was that a substantial part of my income would be attached by a [j]udgment to Wells Fargo and I would not be able to continue to support our children or pay [] spousal support.”

On July 1, 2008, Deborah filed her reply and a supplemental declaration, which described the hardships resulting from Jon's bankruptcy, including her forced participation in Wells Fargo's judgment creditor examinations, which had damaged her ability to find employment. According to Deborah, although she had tried "every way [she] could think of to get back into the workforce," including securing an "insurance license" and a hypnotherapist's license, Jon's bankruptcy and its effects had frustrated her efforts. She stated: "So far, I have been unable to use these tools to increase my income because every time I start to do so, I have to stop and deal with some problem caused by [Jon's] financial irresponsibility."

Deborah also alleged two other material changes in her circumstances. According to Deborah, she no longer received child support payments because Drew and Spencer had become adults. In addition, she asserted that Jon's gross income had increased from the amount recited in the judgment of dissolution to \$24,000 per month.

Deborah noted in her declaration that Jon intended to file for bankruptcy under Chapter 13, and that he proposed to pay the Wells Fargo debt over a five-year period. She nonetheless contended that Jon's proposal would not allow her "to get [her] life back to normal," as it did not compensate her for her "non-economic damages" or prevent Wells Fargo from garnishing her salary.

On July 8, 2008, Deborah's application came on for hearing before the family court. Deborah and Jon were sworn as witnesses, but neither testified. As the parties had been deposed but no deposition transcripts were available, their counsel proposed to present offers of proof in lieu of testimony. The family court accepted this proposal.

According to the offers of proof, Deborah had worked as a billing clerk and secretary during the first ten years of the marriage. She did not seek employment for two years after the couple separated. She later held several part-time positions

-- including a position as a bookkeeper for approximately 20 hours per month at \$25.00 per hour -- but currently focused her efforts on developing a practice as a hypnotherapist, as she had completed her educational program in hypnotherapy. On Jon's behalf, his counsel recounted the history of the bankruptcy proceedings, noting that Jon had filed a new bankruptcy action under Chapter 13. According to Jon's counsel, on July 5, 2008, Jon had submitted a plan in that action to pay his liabilities -- including the judgment in Deborah's favor -- at a rate of \$5,000 per month for five years.

In ruling on Deborah's application, the family court found that Wells Fargo's judgment against Deborah did not constitute a material change in her circumstances, as the parties had anticipated Jon's bankruptcy and its potential aftermath in structuring their marital settlement. However, the family court identified two material changes in her circumstances, each of which warranted a temporary increase in spousal support: the end of child support payments, and the increase in Jon's gross income. The family court noted the bankruptcy litigation between the parties and Deborah's litigation expenses, and stated: "It does appear that [Jon] continues to enjoy the same standard of living he ha[d] during the 20 year marriage, but [Deborah] has not been able to enjoy that same standard of living." The family court found that each change justified an increase in spousal support of \$500 per month, resulting in a total increase of \$1,000 per month, and further determined that the increase would be effective for a one-year period, beginning July 1, 2008. The order directing the temporary increase in spousal support was filed on December 18, 2008.<sup>2</sup>

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Although a post-judgment order modifying spousal support is appealable (*In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1158), Deborah's appeal is premature. On September 28, 2008, Deborah noticed her appeal from the ruling (*Fn. continued on next page.*)

## DISCUSSION

Deborah contends that the family court erred in ordering only a one-year increase in spousal support. For the reasons explained below, we disagree.

Generally, “[m]odification of spousal support, even if the prior amount is established by agreement, requires a material change of circumstances since the last order. [Citations.] [‘]Change of circumstances[’] means a reduction or increase in the supporting spouse’s ability to pay and/or an increase or decrease in the supported spouse’s needs.” (*In re Marriage of McCann* (1996) 41 Cal.App.4th 978, 982.) The relevant circumstances are enumerated in section 4320 of the Family Code.<sup>3</sup> (*In re Marriage of Terry* (2000) 80 Cal.App.4th 921, 928.)

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announced at the hearing on July 8, 2008. As the family court directed Deborah to prepare the final order at the hearing, only the order filed on December 18, 2008 is appealable. (*County of Alameda v. Johnson* (1994) 28 Cal.App.4th 259, 261, fn. 1.) Because Jon has not objected to Deborah’s premature notice of appeal, we conclude that there is good cause to treat the notice as having been filed immediately after the December 18, 2008 order. (Cal. Rules of Court, rule 8.104(e); *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1827-1828.)

<sup>3</sup> Family Code section 4320 provides in pertinent part: “In ordering spousal support . . . , the court shall consider all of the following circumstances: [¶] (a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following: [¶] (1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment. [¶] (2) The extent to which the supported party’s present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties. [¶] (b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party. [¶] (c) The ability of the supporting party to pay spousal support, taking into account the supporting party’s earning capacity, earned and unearned income, assets, and standard of living. [¶] (d) The needs of each party based on the standard of living established during the marriage. [¶] (e) The obligations and assets, including the  
(Fn. continued on next page.)

We review the trial court's ruling for an abuse of discretion. (*In re Marriage of McCann*, *supra*, 41 Cal.App.4th at pp. 982-983.) To the extent the ruling rests on findings, whether express or implied, we examine the record for substantial evidence to support these findings.<sup>4</sup> (*In re Marriage of Aninger* (1990) 220 Cal.App.3d 230, 238.) In assessing the evidence before the family court, we include counsels' statements at the hearing on Deborah's application, insofar as the statements fall within the procedural stipulation accepted at the hearing. Although the unsworn statements of counsel ordinarily do not constitute evidence (*In re Zeth*

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separate property, of each party. [¶] (f) The duration of the marriage. [¶] (g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party. [¶] (h) The age and health of the parties. [¶] (i) Documented evidence of any history of domestic violence, as defined in Section 6211, between the parties, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party. [¶] (j) The immediate and specific tax consequences to each party. [¶] (k) The balance of the hardships to each party. [¶] (l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a 'reasonable period of time' for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties. [¶] (m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4325. [¶] (n) Any other factors the court determines are just and equitable."

<sup>4</sup> Regarding the existence of substantial evidence, "this court must accept as true all evidence tending to establish the correctness of the trial judge's findings, resolving all conflicts in the evidence in favor of the prevailing party and indulging in all legitimate and reasonable inferences to uphold the judgment. When a finding of the trial court is attacked as being unsupported, our power begins and ends with a determination of whether there is any substantial evidence which will support the conclusions reached by the trial court." (*In re Marriage of Meegan* (1992) 11 Cal.App.4th 156, 161.)



S. (2003) 31 Cal.4th 396, 414, fn. 11), “[a] so-called ‘offer of proof’ may be a substitute for evidence if the parties stipulate that the court may consider it as such.” (*Espinoza v. Calva* (2008) 169 Cal.App.4th 1393, 1398.)

The focus of our inquiry is narrow. Neither Deborah nor Jon challenge the amount of the increase in spousal support. Deborah’s sole contention on appeal concerns the *length* of the increase. As she sought a three-year increase, the precise question before us is whether the family court properly limited the increase to a one-year period.

There is little case authority regarding the selection of an appropriate period for a temporary increase in spousal support. In *In re Marriage of Prietsch & Calhoun* (1987) 190 Cal.App.3d 645, 654 (*Prietsch*), a divorced husband was ordered to pay \$600 per month in spousal support. When he sought to have spousal support terminated, his former wife asked that support be increased to \$2,000 per month. (*Ibid.*) The family court raised the level of support to \$900 per month, but imposed an automatic “stepdown” that reduced the support by \$100 per month on an annual basis, until no support was owed. (*Ibid.*)

In reversing the provision for a stepdown in the modification order, the appellate court concluded that there was insufficient evidence to support the temporal stages and overall length of the stepdown. (*Prietsch, supra*, 190 Cal.App.3d at pp. 656-659.) The court stated: “‘Orders automatically decreasing in amount at specified intervals cannot be based on mere supposition as to what the supported party’s future circumstances might be. Evidence in the record must support a reasonable inference that needs will be less with each step-down and that the spouse can realistically be self-supporting at the time nominal payments are set to begin.’” (*Id.* at p. 656, quoting 1 Hogoboom & King, Cal. Practice Guide: Family Law 1 (Rutter 1986) § 6:141.)

Here, we confront a temporary increase from an established amount of spousal support, rather than a stepdown terminating spousal support.<sup>5</sup> However, because *Prietsch* requires ““a reasonable inference”” for ““each stepdown”” (*Prietsch, supra*, 190 Cal.App.3d at p. 656), we conclude that the selection of a one-year period for the increase must rest on reasonable inferences from substantial evidence. As explained below, the record contains the requisite evidence.

The key question before us is whether the one-year period gave Deborah sufficient “breathing room” to increase her earned income to overcome the financial hardships she identified in her application. Deborah presented evidence that she could earn up to \$300 per day as a hypnotherapist, but that her efforts to increase her net income were thwarted by three obstacles: the Wells Fargo judgment against her; her litigation over the judgment, which had diverted her from pursuing employment; and the loss of child support payments.

Our inquiry is governed by the family court’s findings regarding the appropriate increase in the amount of spousal support. The court determined that

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<sup>5</sup> Pointing to the family court’s assessment of the parties’ earning capacities, Deborah suggests that the family court found that within one year, Deborah could earn income sufficient to replace her spousal support. The family court, in describing Deborah’s earning capacity, stated: “The Court finds that [Deborah] is still attempting to fulfill her full earning capacity. The Court has taken [Deborah’s] efforts into account, but is only making a temporary increase in the amount stated *expecting [Deborah] to become self-sufficient within one-year of the increased period, that is[,] by June 30, 2009. . . . [T]he Court is making a temporary increase to allow [Deborah] time to get back on her feet and continue to seek employment.*”

Deborah argues that the italicized portion of the finding establishes that the family court concluded that she could be fully self-supporting. We disagree. Viewed in context, the family court concluded only that Deborah could earn sufficient additional income within one year to obviate any further increase over the established level of spousal support.

the Wells Fargo judgment did not justify an increase in spousal support, and it valued the remaining two financial hardships at \$1,000 per month. As Deborah does not challenge these findings, we set aside the Wells Fargo judgment, and accept the family court's valuation of the other two hardships.

In ordering the one-year increase, the family court remarked that “[t]he record is unclear as to the exact reason why [Deborah] has struggled with employment[,]” but stated that it had considered “the length of the bankruptcy proceedings and where the parties [stood] in those proceedings.” On these matters, Deborah attributed her difficulties in finding employment, at least in part, to her litigation with Jon. Regarding this litigation, the record establishes that Deborah’s judgment against Jon regarding the Wells Fargo debt directed her to pass on Jon’s damage payments to Wells Fargo, and to negotiate with Wells Fargo for purposes of assigning her rights under the judgment to Wells Fargo; in addition, the record discloses that Jon had proposed to pay the judgment under a five-year plan within the Chapter 13 bankruptcy proceeding.<sup>6</sup> This evidence supports the reasonable inference that the parties would soon enter into a stable arrangement -- acceptable to Deborah, Jon, and Wells Fargo -- for payment of the Wells Fargo debt, and thereby end the litigation that had diverted Deborah from obtaining employment. In our view, the family court properly concluded that within one year, Deborah’s litigation with Jon would no longer impede her efforts to secure employment.

Deborah contends that there is insufficient evidence that within one year she could earn \$1,000 or more per month to replace the temporary increase in spousal

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<sup>6</sup> We conclude that Jon’s proposed five-year plan fell within the evidence before the family court, as Deborah referred to it in her supplemental reply declaration, and Jon’s counsel described in it in connection with the offers of proof at the hearing on Deborah’s application.

support. However, according to the offers of proof before the family court, Deborah had been earning \$1,000 per month (20 hours per month at \$25 per hour) as a bookkeeper. As Deborah had completed her educational program in hypnotherapy and the litigation between the parties was nearing an end, there was adequate evidence that Deborah could continue to earn income as a bookkeeper while she developed her practice as a hypnotherapist.

Deborah's reliance on *In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71 (*Stephenson*) is misplaced, as that case is distinguishable. There, a divorced husband paying \$1,500 per month in spousal support retired at the age of 59, and received \$52,000 in severance pay. (*Id.* at p. 75.) The family court treated the severance pay as regular income, and ordered the husband to continue paying \$1,500 per month in spousal support for eight and one-half months, at which time the support payments would be reduced to \$345 per month. (*Id.* at pp. 75-76.) In ruling, the family court made no finding regarding the husband's ability to earn income at the time the payments were to be reduced. (*Id.* at p. 81.) The appellate court reversed the order to the extent that it reduced spousal support, reasoning that the family court erred in failing to consider the husband's earning capacity. Here, unlike *Stephenson*, the family court considered the parties' earning capacities, and found that Deborah could increase her net income sufficiently within a one-year period to offset any detriment suffered as result of the Wells Fargo litigation and the loss of child support. As we have explained, substantial evidence supports the family court's findings. In sum, we discern no error in the family court's order.

## **DISPOSITION**

The order of the family court is affirmed. Respondent is awarded costs on appeal.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.